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Supreme Court, U.S.
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No. 06-438

IN THE

Supreme Court of the United States

SHELBY S., a minor by and through her Conservator and next friend, KATHLEEN T.,

Petitioners,

v.

CONROE INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a parent deny a public school district the opportunity to evaluate the special education and related services a child needs under the Individuals with Disabilities Education Act and force it instead to provide the educational program the parent unilaterally determines to be appropriate?

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Shelby S. b/n/f Kathleen T. v. Conroe Indep. Sch. Dist., 454 F.3d 450 (5th Cir. 2006).

Shelby S. b/n/f Kathleen T. v. Conroe Indep. Sch. Dist., No. H-03-4184 (S.D. Tex. June 10, 2004).

Conroe Indep. Sch. Dist., v. Shelby S. b/n/f Kathleen T., Docket No. 183-SE-0203 (SEA Tex. July 9, 2003).

LEGAL PROVISIONS INVOLVED

The text of the cited provisions are set out in the Appendix to Respondent's Brief in Opposition to Petitioner's Petition For a Writ as it was not contained in the Petitioner's Appendix as required by Supreme Court Rule 14.1(f).

Federal Constitutional Provisions

U.S. CONST. amend XIV, § 1

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STATEMENT OF THE CASE

The material facts are not in dispute. Shelby has a life-threatening medical condition which entitles her to special education and related services under the Individuals with Disabilities Education Act ("IDEA"). Shelby resides with her grandmother, Kathleen T., in the Conroe Independent School District in Conroe, Texas. Prior to the 2002-2003 school year (her second grade year), Shelby received educational services from the school district in Kathleen T.'s home and only made brief visits to the school for "socialization." Although she allowed Shelby to attend school at the beginning of that year, Ms. T. insisted that she must attend school with Shelby because her presence was necessary in order to provide potentially life saving support. Unfortunately, it quickly became apparent that Ms. T.'s presence in the classroom was extremely disruptive to the education of Shelby and the other students. She was directed by the school principal to refrain from attending class with Shelby. Ms. T. responded by providing a letter to the school from Shelby's private physician stating that Ms. T. needed to attend class with Shelby for medical reasons until Ms. T. could train another person to attend to Shelby's healthcare needs.

Concerned for Shelby's safety, school personnel requested permission to speak directly with Shelby's physician regarding

the extent of her need for supportive services in the classroom. Ms. T. refused to give consent. Instead, she required the school to put its questions in writing. Ms. T. revised the proposed list of questions so that it included only the questions she preferred. She then indicated that she would only allow a few school district employees, selected by her, to have a phone conference with the doctor regarding the written questions. She refused to allow open communication during the conference with the doctor, who merely provided responses to the questions Ms. T. had selected.

Frustrated by its inability to obtain unfettered access to Shelby's physician and conflicting information it had received from Ms. T. regarding the precise nature and extent of Shelby's healthcare needs, the school district requested permission to do its own medical evaluation. Ms. T. refused. After continuing to attempt to obtain specific information from Shelby's physician, the school district was ultimately forced to file a request for a special education due process hearing to override Ms. T.'s refusal to consent to the evaluation.

The hearing was held, and the hearing officer admitted 351 pages of exhibits and listened to two days of testimony on the narrow issue of whether the District had the right to conduct the evaluation with personnel of its own choosing. Significantly, during the hearing, Shelby's physician testified that she was completely unaware that Shelby was a special education student and that she had allowed Ms. T. to draft her letters to the school regarding Shelby's medical needs. At the conclusion of the hearing, the hearing officer issued a decision granting the school district the right to evaluate Shelby over Ms. T.'s objections. In fact, he found that due to Ms. T. and Shelby's physician's actions, the limits of Shelby's

disability were unknown to the school, leaving it at an extreme disadvantage in attempting to determine what supportive services Shelby needed in order to safely attend school. Relying on the Fifth Circuit's decision in *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995), *cert. denied*, 519 U.S. 812 (1996), he concluded that the facts of the case supported the district's right to conduct the evaluation. In fact, the hearing officer concluded that "in the face of conflicting or missing information about Shelby's eligibility for specific accommodations and support services, the district was almost obligated to augment its information in order to develop an Individual Education Plan ("IEP") which would meet Shelby's unique educational needs."[1]

The District Court and the Fifth Circuit affirmed the school district's authority to conduct the evaluation it properly determined was needed to ensure that Shelby received a free appropriate public education in a safe educational environment. An opposite result would be

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1. Under the IDEA, special education students receive individualized instruction in accordance with an Individual Education Plan ("IEP") developed by a team comprised of school administrators, teachers, and the child's parents. See 20 U.S.C. §§ 1401(11), 1414(d); § 1401(14) (2004). In Texas, the team is referred to as the Admissions, Review & Dismissal ("ARD") Committee. 19 T.A.C. § 89.1050; s*ee also Cypress-Fairbanks Indep. Sch. Dist v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir. 2000), *cert. denied*, 531 U.S. 817, 121 S. Ct. 55 (2000). The IEP includes an assessment of the present performance of the child, his annual goals and short-term instructional objectives, the extent to which the child can participate in regular programs, the projected initiation date and anticipated duration of the program, and the procedures for determining whether the instructional objectives are achieved. 20 U.S.C. § 1414(d)(1).

tantamount to allowing Ms. T. to dictate to the school the nature of the supportive services the school district is required to provide to Shelby under the IDEA. In the face of threats from Ms. T. that the failure to provide appropriate services could lead to Shelby's death, the evaluation proposed by the school district was clearly reasonably related to the performance of its duty under the IDEA.

Pursuant to Supreme Court Rule 12(2), the following are misstatements of fact in Petitioner's factual recitation of this case:

- Petitioner implies that Ms. T. was excluded from the classroom due to the complaints she made regarding the implementation of Shelby's modifications. Petition for a Writ at p. 9. In reality, Shelby's teacher testified that Ms. T.'s behavior in the classroom was disruptive to the learning of Shelby and the other students. The hearing officer found as a matter of fact that the school administration excluded Ms. T. from class when it determined her presence there was unsatisfactory.

- Petitioner argues that the evidence presented at the due process hearing establishes that the District's expert, Dr. Gary Clark, could not have safely evaluated Shelby. Petition for a Writ at p. 11. However, a finding in support of this assertion was not made by the hearing officer, the district court, or the Fifth Circuit. To the contrary, Dr. Clark, a licensed child neurologist familiar with Dysautonomia, testified that he was confident that he could safely perform an evaluation of Shelby's needs.

- Petitioner argues that the hearing officer demonstrated bias because he failed to consider her argument that the requested evaluation was not warranted and could be harmful. Petition for a Writ at p. 12. This argument is belied by the record and the fact that the hearing officer admitted hundreds of pages of d cuments and elicited testimony on his own regarding the potential harm of the evaluation.

SUMMARY OF THE REASONS FOR DENYING THE PETITION

The only issue presented for review is a claim by Kathleen T. that her constitutional right to the care, custody, and control of her child is violated by the holding of the Fifth Circuit. The Court should deny the Petitioner's Petition for a Writ of Certiorari because Kathleen T. did not properly perfect an appeal to the Fifth Circuit in her individual capacity and her claims were not considered by the Fifth Circuit. Thus, she may not appeal to this Court. Additionally, the Fifth Circuit's determination that the IDEA authorizes a school district to conduct a medical evaluation of a student to assess the child's special education needs is not constitutionally problematic because Kathleen T. is free to decline special education for Shelby rather than consent to the evaluation.

The Fifth Circuit has, again, correctly interpreted the IDEA. In *Andress*, the Fifth Circuit held that school districts have an absolute right under the IDEA to conduct evaluations with personnel of its own choosing. 64 F.3d at 178-79. The court stated there was no exception to the rule. This Court denied a petition for a writ in that case. There are no conflicting opinions from any Federal Circuit or District

Court. In this case, the Fifth Circuit articulated what was implicit in *Andress*; as long as a school district has "reasonable grounds" for requesting the evaluation in the first instance, it is permissible under the IDEA. This interpretation of the provisions of the IDEA does not implicate the constitutional rights of Kathleen T.

Lastly, assuming *arguendo* that Kathleen T. has standing and that the action complained of is State action, the evaluation is not constitutionally impermissible because a parent's right to the care, custody, and control of their child is not absolute in the educational arena. While parents retain the right to determine *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child.

REASONS FOR DENYING THE PETITION

I. Ms. T. Waived Her Right to Bring Claims on Her Own Behalf.

The Fifth Circuit did not consider any claims Ms. T. asserted in her individual capacity because she did not perfect an appeal from the district court in that capacity. A party seeking appellate review must comply with Rule 3 of the Rules of Appellate Procedure. That rule provides, in relevant part, that the notice of appeal must specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A,B, et al.," or "all defendants except X". . . . Fed. R. App. P. 3(c)(1)(A). While courts generously construe documents to satisfy the requirements of the Rule, this principle of liberal construction

does not excuse compliance with the Rule. *See Smith v. Barry*, 502 U.S. 244, 248 (1992). The purpose of the Rule is to provide sufficient notice to other parties and the courts. *United States v. Glover*, 242 F.3d 333, 336 (6th Cir. 2001). The advisory committee notes to Rule 3 indicate that "[t]he test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal." Fed. R. App. P. 3(c) advisory committee note.

In the district court, the Petitioner's Original Complaint was styled "Shelby S. b/n/f Kathleen T., Plaintiffs" and asserted claims exclusively under the IDEA on Shelby's behalf. Subsequently, Petitioner's attorney filed a First Amended Complaint and styled the case "Shelby S. b/n/f Kathleen T., Kathleen Thomas, Individually, Plaintiffs." In that Complaint, Petitioner's attorney pleaded causes of action on behalf of both Shelby and Ms. T. under the IDEA, Section 504 of the Rehabilitation Act (29 U.S.C. § 794), Section 1983 based on violations of the 14th Amendment to the United States Constitution, and 42 U.S.C. § 2000d for attorneys' fees. The parties briefed the issues in multiple motions, responses and replies. The district court, noting that Ms. T. was suing in her own behalf and as next friend of Shelby, granted the school district's Motion for Summary Judgment. It affirmed the hearing officer's decision in favor of CISD and dismissed Kathleen T.'s constitutional claims on the merits.

The Notice of Appeal to the district court was styled "Shelby S. b/n/f Kathleen Thomas, Plaintiffs." The text of the Notice reads: "Notice is hereby given that Shelby S. by next friend Kathleen Thomas, Plaintiffs in the above-named cause, hereby appeal . . . ." When the Fifth Circuit Clerk's

Office received the Notice of Appeal, it issued a Caption Sheet which indicated that Shelby S. was the sole Plaintiff-Appellant. The style of the case read: "*Shelby S. by next friend Kathleen T, Plaintiff-Appellant, v. Conroe Independent School District, Defendant-Appellee.*" Although the parties briefed the issues raised on behalf of both Shelby and Kathleen T., it is apparent that the Fifth Circuit found that Kathleen T. had not properly perfected an appeal in her individual capacity because it did not address her claims. No objections were made to the style of the case in writing or at oral argument. The appellate court had a duty to *sua sponte* consider whether it had jurisdiction over the claims before it. *See Griffith v. Johnston*, 899 F.2d 1427, 1429 (5th Cir. 1990). The first sentence of the Court's opinion states, "Plaintiff-Appellant Shelby S. ("Shelby") appeals the district court's grant of summary judgment in favor of Defendant-Appellee Conroe Independent School District ("CISD")." The Notice of Appeal did not make it sufficiently clear to the Fifth Circuit that Kathleen T. intended to appeal any claims in her individual capacity. She cannot now seek certiorari on claims that she did not properly appeal to the Fifth Circuit.

II. The Fifth Circuit Correctly Interpreted the IDEA.

The Fifth Circuit correctly determined that the IDEA permits a school district to conduct an evaluation of a child's special education needs if it can articulate reasonable grounds for the necessity of the evaluation. The IDEA makes grants to States to assist them in providing eligible children with a free appropriate public education ("FAPE"). 20 U.S.C. § 1400(d)(1)(A).[2]

2. A recent reauthorization of the IDEA became effective on July 1, 2005, after the request for due process hearing was filed, heard and decided. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, (Cont'd)

A FAPE is defined by the Act to mean "special education and related services that are . . . provided in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C. § 1401(8); § 1401(9) (2006). Pursuant to the IDEA, school districts must create an individualized education plan ("IEP") for each child with a qualifying disability. 20 U.S.C. § 1414(d). The IEP is the central vehicle by which school officials and parents collaborate to meet the child's special needs in the educational environment. *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528, 532 (2005).

Before a child may begin receiving special education services the school district must conduct a full and individual evaluation. 20 U.S.C. § 1414(a)(1)(A). Subsequent evaluations must be conducted "if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once very 3 years." 20 U.S.C. § 1414(a)(2)(A). As part of an initial evaluation or reevaluation, the IDEA mandates that the IEP Team and other qualified professionals review existing data and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine (1) the child's eligibility classification, (2) her present levels of performance, (3) her need for special education and related

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(Cont'd)

2803(codified as amended at 20 U.S.C. § 1400 *et seq.*). Consequently, the statutory citations are to the previous IDEA provisions. *See* 20 U.S.C. § 1400 *et. seq.* (1997). Although the Respondent does not believe that any of the changes in the law affect the issues in this case, for the Court's convenience, parallel citations are made to the new IDEA only when the citation changed, as follows: § ____ (2004). Likewise, new implementing regulations have also been promulgated. A parallel citation to the new regulations will be provided when necessary and cited as follows: § ___ (2006).

services (as in this case), and (4) her need for modifications. 20 U.S.C. § 1414(c)(1), (2).

According to the Federal Regulations, "related services" means "such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and *medical services for diagnostic or evaluation purposes.*[3] The term also includes school health services, social work services in schools, and parent counseling and training. 34 C.F.R. § 300.24(a) (emphasis added); § 300.34(a)(2006).

If the IEP Team determines that additional data are needed, the responsibility for conducting the evaluations to produce the needed data is expressly placed on the school district. *See* 20 U.S.C. § 1414(a)(1)(A), & (a)(2). Equipped with complete evaluation data the ARD committee can develop the IEP envisioned by the Act. *See Patricia P. v. Bd. of Educ. of Oak Park*, 203 F.3d 462, 468 (7th Cir. 2000) (recognizing that school districts need proper evaluations to develop IEP's).

In its opinion in the case at bar, the Fifth Circuit merely articulated what was implicit in *Andress*, that is, that the requested evaluation must be reasonably calculated to

3. Petitioner indicated in her Petition for Writ that medical services only qualify as related services if they are for diagnostic purposes and omitted the reference to evaluation purposes. Petition for a Writ at p. 4.

produce the information needed to establish the child's eligibility and develop his IEP.[4] It is not permitted to arbitrarily request evaluations that will not aid the ARD Committee. In *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999), this Court explained that a school district has a duty under the IDEA to provide such supportive services to a child as may be necessary to allow the child to remain in school even though the services may be medical in nature. It would be incongruous to suggest that a school district has an obligation to provide services that are medical in nature but cannot evaluate the need for those services. In order to evaluate a child's needs, the implementing regulations require school districts to assess "in all areas related to the suspected disability, including, if appropriate, *health*, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.532(g); § 300.304(c)(4) (2006) (emphasis added). Furthermore, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.532(h); § 300.304(c)(6) (2006).

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4. In *Andress*, the parents did not dispute that the specific evaluation requested, a psychological, would produce the data required by the Act. The parents argued only that they had already provided the District with an evaluation and that another one would be harmful to their child. *Andress*, 64 F.3d at 178.

1. There is consensus among the Circuit Courts that a school district may evaluate a student by an expert of its choice.

Every court that has considered the issue has concluded that school districts have a right to conduct evaluations by personnel of their own choosing. *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1160 (11th Cir. 2006) (holding school could condition continued special education services on reevaluation by its expert); *Johnson v. Duneland Sch. Corp.*, 92 F.3d 554, 558 (7th Cir. 1996) (stating school cannot be forced to rely solely on evaluation obtained by parents); *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176, 178-79 (5th Cir. 1995) (finding nothing in the statute, regulations or case law which prevents school districts from obtaining an evaluation by personnel of its own choice); *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987) (stating that if parents want special education they must permit the school district to evaluate); *Dubois v. Conn. State Bd. of Ed.*, 727 F.2d 44, 48 (2nd Cir. 1984). The IDEA has been reauthorized on two separate occasions, 1997 and 2004, and Congress has not amended the statute to alter the result reached by these courts.

The Fifth Circuit first considered the parameters of a district's duty to evaluate in *Andress v. Cleveland Indep. Sch. Dist.*, 64 F.3d 176 (5th Cir. 1995). In *Andress*, the Court considered the parents' argument that the requested evaluation would harm their child but concluded there was no statutory exception to the District's right and refused to create a judicial exception to the rule. *Andress,* 64 F.3d at 178-79. In fact, the Court emphasized that a parent who disagrees with the district's evaluation has a statutory right to request an evaluation by an independent evaluator, possibly

at public expense, and that the district must consider that evaluation. *Andress,* 64 F.3d at 178; 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502. Thus, the Court reasoned "it would be incongruous under the statute to recognize that the parents have a reciprocal right to an independent evaluation, but the school does not." *Id.* This Court denied the parents' request a Petition for a Writ of Certiorari in *Andress*. 519 U.S. 812 (1996).

2. The Fifth Circuit's "reasonableness" standard is consistent with the IDEA.

The standard articulated by the Fifth Circuit recognizes that, under the IDEA, school officials are accorded a high degree of deference and flexibility in determining what data it needs to develop the child's program. *See* 20 U.S.C. § 1414(c)(1) (requiring only that the district review existing evaluations before determining what additional data it needs); *see also Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989) (schools must retain significant flexibility in educational planning if they truly are to address each child's needs). When conducting evaluations the district must use tools and strategies to gather "relevant" information that "may assist" the district in determining eligibility or the contents of a child's IEP. 20 U.S.C. § 1414(b)(2). Therefore, assuming there is a reasonable relationship between (1) the determination of the child's eligibility classification, present levels of performance, special education or related services needs, or modifications needs of the child, and (2) the requested evaluation, then the district has an unconditional right to seek the requested evaluation. *See* 20 U.S.C. § 1414(c)(1)(B)(i-iv) (stating categories for which the district must acquire data). Therefore, the Fifth Circuit correctly articulated the consideration which the school must give to its evaluation requests.

III. The Evaluation Does Not Violate the Fourteenth Amendment.

The evaluation at issue does not infringe upon the constitutional rights of Shelby or Ms. T. Kathleen T. asserts a fundamental right under the Fourteenth Amendment to determine whether her child must submit to a medical evaluation. The substantive component of the Due Process Clause of the Fourteenth Amendment provides heightened protection against government interference with certain fundamental rights and liberty interests. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Although the fundamental right of a parent to the care, custody and control of their child has been long recognized, it is far from absolute, especially in the educational context. *See, e.g., Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998) (collecting cases that demonstrate "parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject.").[5] As the Sixth Circuit explained:

> The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school

5. For example, a state has a right to require children to be immunized as a condition to admission to public school. *Boone v. Boozman*, 217 F. Supp. 2d 938, 956-57 (E.D. Ark. 2002). States may subject home-school children to standardized testing over the parent's objection. *Murphy v. State of Arkansas*, 852 F.2d 1039 (8th Cir. 1988). Parents may not exempt their children from reading programs chosen by the district. *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988).

> curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school, or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.

Blau v. Fort Thomas Public School District, 401 F.3d 381, 395-96 (6th Cir. 2005) (internal quotations omitted) (collecting cases).

Consistent with this understanding of fundamental rights in the educational context, the Eighth Circuit recently recognized that the evaluation provisions of the IDEA do not permit a school district to evaluate a private-school student if his parents refuse to consent to the testing and expressly waive all benefits under the IDEA. *Fitzgerald v. Damdenton R-III Sch. Dist.*, 439 F.3d 773, 778 (8th Cir. 2006).

Petitioner argues that a school district's ability to condition the provision of special education on the parent's consent to a medical evaluation abrogates Congress's desire to provide disabled children with services. However, Congress itself determined that the best way to ensure that children with disabilities receive a free appropriate public education is to require the State to evaluate the child in all areas of suspected disability. It clearly never intended to abrogate the State's historical authority in the area of education by permitting parents and their doctors to dictate to a school district what the child's educational program will entail.

The notion that Congress would permit a parent to force a public school district to provide a special education program based solely on the opinions of the parent and the parent's private physician is contrary to the statute and sound public policy. As the facts of this case so vividly demonstrate, granting parents such unilateral authority invites abuse of that power, such as when a parent scripts the doctor's letters and makes arbitrary determinations about what information she will, or will not, allow the school district to receive. It is patently unreasonable to require a school district to be responsible for a child's health and safety without allowing it to use qualified personnel of its own choosing to evaluate the scope of its responsibility.

CONCLUSION

For the above reasons, the Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX — LEGAL PROVISIONS INVOLVED

Federal Constitutional Provisions

U.S. CONST. amend XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 U.S.C. § 1400

* * *

(d) Purposes

The purposes of this chapter are

> (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and

independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

* * *

§ 1401. Definitions

(8) Free appropriate public education—

The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

Appendix

* * *

(11) Individualized education program

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.

* * *

(22) Related services

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

* * *

20 U.S.C. § 1412

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by

section 1415 of this title.

(B) Additional procedural safeguards

Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

* * * *

20 U.S.C. § 1414

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

(A) In general

A State educational agency, other State agency, or local educational agency shall conduct

a full and individual initial evaluation, in accordance with this paragraph and subsection (b) of this section, before the initial provision of special education and related services to a child with a disability under this subchapter.

(B) Procedures

Such initial evaluation shall consist of procedures —

(i) to determine whether a child is a child with a disability (as defined in section 1401(3) of this title); and

(ii) to determine the educational needs of such a child.

(C) Parental consent

(i) In general

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401(3)(A) or 1401(3)(B) of this title shall obtain an informed consent from the parent of such child before the evaluation is conducted. Parental consent for evaluation shall not be construed as

consent for placement for receipt of special education and related services.

(ii) Refusal

If the parents of such child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under section 1415 of this title, except to the extent inconsistent with State law relating to parental consent.

(2) Reevaluations

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted—

(A) if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation, but at least once every 3 years; and

(B) in accordance with subsections (b) and (c) of this section.

(b) Evaluation procedures

(1) Notice

Appendix

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

(2) Conduct of evaluation

In conducting the evaluation, the local educational agency shall —

(A) use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities;

(B) not use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Additional requirements

Each local educational agency shall ensure that —

(A) tests and other evaluation materials used to assess a child under this section —

(i) are selected and administered so as not to be discriminatory on a racial or cultural basis; and

(ii) are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and

(B) any standardized tests that are given to the child —

(i) have been validated

for the specific purpose for which they are used;

(ii) are administered by trained and knowledgable personnel; and

(iii) are administered in accordance with any instructions provided by the producer of such tests;

(C) the child is assessed in all areas of suspected disability; and

(D) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided.

(4) Determination of eligibility

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

(5) Special rule for eligibility determination.

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is lack of instruction in reading and math or limited English proficiency.

(c) Additional requirements for evaluation and reevaluations

(1) Review of existing evaluation data

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team described in subsection (d)(1)(B) of this section and other qualified professionals, as appropriate, shall —

(A) review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current class-room-based assessments and observations, and teacher and related services providers observation; and

(B) on the basis of that review, and

input from the child's parents, identify what additional data, if any, are needed to determine—

> (i) whether the child has a particular category of disability, as described in section 1401(3) of this title, or, in case of a reevaluation of a child, whether the child continues to have such a disability;
>
> (ii) the present levels of performance and educational needs of the child;
>
> (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and
>
> (iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child

and to participate, as appropriate, in the general education curriculum.

(2) Source of data

The local educational agency shall administer such tests and other evaluation materials as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

(3) Parental consent

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(C) of this section, prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

(4) Requirements if additional data are not needed

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, the local educational agency —

(A) shall notify the child's parents of —

(i) that determination and the reasons for it; and

(ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

(5) Evaluations before change in eligibility

A local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

(d) Individualized education programs

(1) Definitions

As used in this chapter:

(A) Individualized education program

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised

in accordance with this section and that includes—

(i) a statement of the child's present levels of educational performance, including —

(I) how the child's disability affects the child's involvement and progress in the general education curriculum; or

(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to —

(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child's other educational

needs that result from the child's disability;

(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child —

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and

(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

(iv) in explanation of the extent, if any, to which the child will not participate with nondisabled children in

the regular class and in the activities described in clause (iii);

(v)(I) a statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of such an assessment), a statement of —

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed;

(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location,

and duration of those services and modifications;

(vii)(I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

(II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

(III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title; and

(viii) a statement of —

(I) how the child's progress toward

the annual goals described in clause (ii) will be measured; and

(II) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of —

(aa) their child's progress toward the annual goals described in clause (ii); and

(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) at least one special education

teacher, or where appropriate, at least one special education provider of such child;

(iv) a representative of the local educational agency who —

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related

services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(2) Requirement that program be in effect

(A) In general

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in its jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State education agency, a 2 year-old child[1] with a disability who will turn age 3 during the school year), an individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, may serve as the IEP of the child if using that plan as the IEP is —

1. So in original. Probably should be "2-year-old".

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider —

(i) the strengths of the child and the concerns of the parents for enhancing the education of their child; and

(ii) the results of the initial evaluation or most recent evaluation of the child.

(B) Consideration of special factors

The IEP Team shall —

(i) in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child requires assistive technology devices and services.

(C) Requirement with respect to regular education teacher

The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(iii)(IV).

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

(i) reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address—

(I) any lack of expected

progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) of this section;

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher

The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child.

(5) Failure to meet transition objectives

If a participating agency, other than the local educational agency, fails to provide the transition

services described in the IEP in accordance with paragraph (1)(A)(vii), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in that program.

(6) Children with disabilities in adult prisons

(A) In general

The following requirements shall not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 1412(a)(17) of this title and paragraph (1)(A)(v) of this subsection (relating to participation of children with disabilities in general assessments).

(ii) The requirements of subclauses (I) and (II) of paragraph (1)(A)(vii) of this subsection (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of their age, before they will be released from prison.

(B) Additional requirement

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections 1412(a)(5)(A) of this title and paragraph (d)(1)(A) of this section if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(e) Construction

Nothing in this section shall be construed to require the IEP Team to include information under one component of a child's IEP that is already contained under another component of such IEP.

(f) Educational placements

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

20 U.S.C. § 1415

§ 1415. Procedural safeguards

* * *

(b) Types of procedures

The procedures required by this section shall include—

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change;

the identification, evaluation, or educational placement of the child, in accordance with subsection (c) of this section,

or the provision of a free appropriate public education to the child;

* * *

(i) Administrative procedures

* * *

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

* * * *

34 C.F.R. § 300.24

§ 300.24 Related Services.

(a) General. As used in this part, the term related services means transportation and such

developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

* * * *

34 C.F.R. § 300.502

§ 300.502 Independent educational evaluation.

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (h) through (e) of this section.

(2) Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where

an independent educational evaluation may he obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this part—

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.301.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) Initiate a hearing under § 300.507 to

show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under § 300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at private expense, the results of the evaluation—

(1) Must he considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child;

and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) Agency criteria.

(1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must he the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(l) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1))

34 C.F.R. § 300.505

Appendix

§ 300.505 Parental consent.

(a) General.

(1) Subject to paragraphs (a)(3), (b) and (c) of this section, informed parent consent must be obtained before—

(i) Conducting an initial evaluation or reevaluation; and

(ii) Initial provision of special education and related services to a child with a disability.

(2) Consent for initial evaluation may not be construed as consent for initial placement described in paragraph (a)(l)(ii) of this section.

(3) Parental consent is not required before—

(i) Reviewing existing data as part of an evaluation or a reevaluation; or

(ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(b) Refusal. If the parents of a child with a disability refuse consent for initial evaluation or a reevaluation, the agency may continue to pursue those evaluations by using the due process procedures under §§ 300.507-300.509, or the mediation procedures under § 300.506 if appropriate, except to the extent inconsistent with State law relating to parental consent.

(c) Failure to respond to request for reevaluation.

(1) Informed parental consent need not be obtained for reevaluation if the pubic agency can demonstrate that it has taken reasonable measures to obtain that consent, and the child's parent has failed to respond.

(2) To meet the reasonable measures requirement in paragraph (c)(1) of this section, the public agency must use procedures consistent with those in § 300.345(d).

(d) Additional State consent requirements. In addition to the parental consent requirements described in paragraph (a) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(e) Limitation. A public agency may not use a parent's refusal to consent to one service or activity under paragraph (a) and (d) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.

(Authority: 20 U.S.C. 1415(b)(3); 1414(a)(1)(C) and (c)(3))

34 C.F.R. § 300.507

§ 300.507 Impartial due process hearing; parent notice.

(a) General.

(1) A parent or a public agency may initiate a hearing on any of the matters described in § 300.503(5)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) When a hearing is initiated under paragraph (a)(1) of this section, the public agency shall inform the parents of the availability of mediation described in § 300.506.

(3) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if—

(i) The parent requests the information; or

(ii) The parent or the agency initiates a hearing under this section.

(b) Agency responsible for conducting hearing. The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) Parent notice to the public agency.

(1) General. The public agency must have procedures that require the parent of a child with a disability or the attorney representing the child, to

provide notice (which must remain confidential) to the public agency in a request for a hearing under paragraph (a)(1) of this section.

(2) Content of parent notice. The notice required in paragraph (c)(1) of this section must include—

(i) The name of the child;

(ii) The address of the residence of the child;

(iii) The name of the school the child is attending;

(iv) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the parents at the time.

(3) Model form to assist parents. Each SEA shall develop a model form to assist parents in filing a request for due process that includes the information required in paragraphs (c)(1) and (2) of this section.

(4) Right to due process hearing. A public

agency may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in paragraphs (c)(1) and (2) of this section.

(Authority: 24 U.S.C. 1415(b)(5), (b)(6), (b)(7), (b)(8), (e)(1) and (f)(1))

34 C.F.R. § 300.532

§ 300.532 Evaluation procedures.

Each public agency shall ensure, at a minimum, that the following requirements are met:

* * *

(g) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(h) In evaluating each child with a disability under §§ 300.531-300.536, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

* * * *

State Regulatory Provisions

Appendix

19 TEX. ADMIN. CODE § 89.1151(b).

(b) The Texas Education (TEA) shall implement a one-tier system of due process hearings under the IDEA. The proceedings in due process hearings shall be governed by the provisions of 34 CFR, §§ 300.507-300.514, and 34 CFR, § 300.528, if applicable, and §§ 89.1151, 89.1165, 89.1170, 89.1180, 89.1185 and 89.1191 of this subchapter.